FILED
MAY 13 1991
OFFICE OF THE CLERK

No. 90-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, OPERATION RESCUE, et al.,

Petitioners,

vs.

ALEXANDRIA WOMEN'S HEALTH CLINIC, NATIONAL ORGANIZATION FOR WOMEN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE ATTORNEYS GENERAL OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
ARGUMENT	3
INTRODUCTION	3
I. THE EXPRESS STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF § 1985(3) DICTATE THAT THE STATUTE APPLIES WHEN, AS HERE, AN INTERSTATE CONSPIRACY SEEKS TO INTERFERE WITH A STATE'S ABILITY TO SECURE THE EQUAL PROTECTION OF RIGHTS UNDER STATE AND FEDERAL LAW	5
A. Providing A Remedy Against Private Conspiracies Intended to Hinder State Authorities from Securing Equal Protection Is One of The Essential Functions of § 1985(3)	7
B. The "Prevent and Hinder" Clause of § 1985(3) Applies to a State's Ability to Secure the Equal Protection of State and Federal Rights	14
II. IT IS NECESSARY TO APPLY FEDERAL CIVIL RIGHTS LAW BECAUSE BOTH THE FEDERAL RIGHTS UNDER ATTACK IN THIS CASE AND THE OPERATION RESCUE CONSPIRACY TRANSCEND THE LIMITS AND AUTHORITY OF ANY ONE STATE	18
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Aradia Women's Health Center v. Operation Rescue, No. 88-1539R (W.D. Wash. Jul. 7, 1989)	18
Briscoe v. LaHue, 460 U.S. 325 (1983)	16
Chico Women's Health Center v. Scully, 256 Cal. Rptr. 194 (Cal. App. 1989)	11
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1983)	5
Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989)	10, 12, 18
Doe v. Bolton, 410 U.S. 178 (1973)	18
Great American Fed. S & L. Ass'n v. Novotny, 442 U.S. 366 (1979)	7, 9
Griffin v. Breckenridge, 403 U.S. 88 (1971)	9, 17
NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1981)	5
National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal docketed*, No. 90-5519 (9th Cir. 1990)	18
New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990)	*passim*
Northeast Women's Center, Inc. v. McMonigle, 868 F.2d 1342 (3rd Cir. 1989)	11

Page

NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990) 3, 10

NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990) (contempt opinion at 1990 U.S. Dist. LEXIS 9017, No. 89-2968-LFO) (D.D.C. Jul. 30, 1990) 7, 18

NOW v. Operation Rescue, No. N-89-3098 (D. Md. Nov. 9, 1989) 18

People, By Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982), *modified on other grounds*, 718 F.2d 22 (1983) 9

Portland Feminist Women's Health Center v. Advocates for Life and Operation Rescue, 712 F. Supp. 165 (D. Or. 1988) 18

Pro-Choice Network of Western New York v. Project Rescue, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990) 10, 11, 18

Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd*, 919 F.2d 857 (3rd Cir. 1990) 18

Roe v. Operation Rescue, 919 F.2d 857 (3rd Cir. 1990) 3, 4, 7

Roe v. Wade, 410 U.S.113 (1973) 17, 18

Shapiro v. Thompson, 394 U.S. 618 (1969) 4, 18

Southwestern Medical Clinics of Nevada v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) 18

Page

Town of West Hartford v. Operation Rescue, 726 F. Supp. 371 (D. Conn. 1989), *vacated* 915 F.2d 92 (2d Cir. 1990) 18

Twining v. New Jersey, 211 U.S. 78 (1908) 4

U.S. v. Price, 383 U.S. 787 (1966) 9

United States v. Harris, 106 U.S. 629 (1882) 16

Walker v. City of Birmingham, 388 U.S. 307 (1967) 13

STATUTES

17 Stat. 14, § 2 (1871) 7

42 U.S.C. § 1985(3) ..... *passim*

Mass. Gen L. ch.12, §§ 11 h, i, j (1988) 19

LEGISLATIVE MATERIAL

Cong. Globe, 42d Cong., 1st Sess. (1871) 8, 12, 15, 16

Oversight Hearings on Abortion Clinic Violence, Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, House of Representatives, 99th Cong., 1st & 2nd Sess. (1985) 19

OTHER AUTHORITIES

Buffalo News, October 29, 1989, p. B1 10

Page

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NARAL Foundation, A State-By-State Review of Abortion Rights 186 (1991) ... 20

Note, Judicial Ineffectiveness: The Inability to Curtail Unlawful Right to Life Protest Activity, 35 N.Y.L.S. L. Rev. 447 (1990) ... *passim*

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R. Harris, The Quest for Equality 47 (1960) ... 8

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INTEREST OF THE *AMICI CURIAE*

Amici are the Attorneys General of States whose health care facilities have been targets of blockades and other conspiratorial activity by Operation Rescue and its local affiliates. *Amici* respectfully submit this brief in support of respondents Alexandria Women's Health Clinic, National Organization for Women, and other respondents.

The conspiratorial activities of Operation Rescue are intended to hinder, and have hindered, the ability of law enforcement

authorities in the States represented by *amici* to maintain law and order. Those activities have also hindered women seeking reproductive health care their right to the equal protection of the laws. Operation Rescue's activities have severely strained the law enforcement and judicial resources of the affected states and localities.

As chief legal officers and representatives of state government, *amici* have a strong interest in ensuring that civil peace is maintained and in protecting the right of citizens to engage in lawful protest activities. Because of the unlawful activities of petitioners, however, other citizens were deprived of rights to reproductive health care and abortion services. Moreover, the states have an interest in securing and maintaining the confidence of their citizens that once abortion services have been made available, those who limit access to such services by conspiratorial activity will be subject to the full force of all available legal remedies, state and federal. In addition, *amici* are committed to ensuring for all their citizens that the laws will be administered even-handedly and without interference by private conspirators, so that citizens may obtain meaningful assurance under the law of protection from discriminatory conduct and denials of equal protection of state-based and federal legal rights.

Amici have, as well, a strong interest in ensuring that their citizens are empowered by federal law to limit the unlawful and injurious activities of petitioners. Operation Rescue is engaged in a conspiracy that is national in scope; its *modus operandi* is to overwhelm state and local law enforcement resources. Actions brought under 42 U.S.C. § 1985(3) address the national scope of the conspiracy and support the efforts of states to maintain peace and order. *Amici* submit that compelling reasons exist for securing this meaningful federal remedy in the arsenal of remedies available to curtail and redress the harms of conspiracies such as the one at issue.

The State of New York and the Commonwealth of Virginia, by their Attorneys General, Robert Abrams and Mary Sue Terry, submit this brief pursuant to Supreme Court Rule 37.5.

ARGUMENT

INTRODUCTION

The blockades of health care clinics and other disruptive, health-threatening activities of Operation Rescue and its local affiliates, such as property vandalism of clinics, and harassment and intimidation of clinic patients and staff, present a problem of national scope. These actions go well beyond lawful protest aimed at securing changes in public policy. The magnitude of these activities is beyond the capability of any one state's laws or law enforcement authorities to redress effectively.

Operation Rescue is a nationwide conspiracy. *See e.g. Roe v. Operation Rescue*, 919 F.2d 857, 861 (3rd Cir. 1990) (The demonstrations in Philadelphia "constituted one phase of a well-orchestrated campaign to disrupt and shut down abortion clinics throughout the nation.") It seeks by unlawful means to undermine and overturn the exercise by women of certain federal constitutional rights, including the right to privacy and the right to decide whether to obtain an abortion, and the right to travel interstate for the purpose of seeking health care. *See New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

Operation Rescue also seeks to render ineffective the decisions made by various sovereign states about access to reproductive health care, including abortion, within the state. The conspiracy does not stop at seeking to deprive women of constitutional rights. It is also intended to prevent and hinder the states from securing for citizens the equal protection of local and state laws, such as public accommodation laws guaranteeing equality of access to health care, laws against trespass, harassment, and public nuisance, and those providing protection against interference with contractual relations.[1] The Operation Rescue

[1] These activities have been found to violate state laws, as well as federal constitutional rights. *See, e.g., NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D.

(Footnote continued)

conspiracy accomplishes this hindrance by overpowering the ability of the states to enforce their own laws and to keep the peace. It is precisely because of the dual purpose of Operation Rescue – to deprive women of the equal protection of the laws, and to hinder state authorities from securing public order – that the activities involved in this case present an especially compelling basis for the remedy provided by 42 U.S.C. § 1985(3).

If § 1985(3) were held not to be available to redress lawless interstate actions, state law would serve as the sole source for preserving the federal rights involved in this case. Such a result would undermine both state and federal interests. The right to interstate travel involved in this case is a right of *national* citizenship. *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Shapiro v. Thompson*, 394 U.S. 618 (1969). It is a right that transcends the boundaries and the authority of any one state to secure. This is especially true in the present situation, where Operation Rescue participants travel from state to state, blockading health care facilities without prior announcement or approval for demonstration by local authorities. This is part of their determined effort to close facilities to residents of the state as well as to women who travel interstate to obtain necessary health care. Certain states have been burdened disproportionately by the disruptions and lawlessness of Operation Rescue, because the number of providers of abortions and other reproductive services varies greatly from state to state. The activities of Operation Rescue make it difficult, if not impossible, for states to maintain unfettered interstate access, which is fundamental to the guarantee of equal protection and to the constitutional right to travel across state borders for lawful health services.

In urging that § 1985(3) provides redress here, *amici* do not seek to stifle legitimate debate on the abortion issue. Indeed, as this Court time and again has made clear, the First

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Va. 1989), *aff'd*, 914 F. 2d 582 (4th Cir. 1990); *New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd*, 886 F. 2d 1339 (2d Cir. 1989), *cert. denied*, 110. S. Ct. 2206 (1990); *Roe v. Operation Rescue*, 919 F. 2d 857 (3rd Cir. 1990).

Amendment enshrines peaceful protest and assembly. *E.g. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1983); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 915 (1981). These and other decisions are reason for confidence that the remedies available under § 1985(3) can be applied – without penalizing the expression of political views – when actions in furtherance of a conspiracy transgress valid time, place and manner restrictions.

I. THE EXPRESS STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF § 1985(3) DICTATE THAT THE STATUTE APPLIES WHEN, AS HERE, AN INTERSTATE CONSPIRACY SEEKS TO INTERFERE WITH A STATE'S ABILITY TO SECURE THE EQUAL PROTECTION OF RIGHTS UNDER STATE AND FEDERAL LAW

According to its explicit language, § 1985(3) is designed to reach two principal sorts of conspiracies: conspiracies "for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"; and conspiracies

> for the purpose of preventing or hindering the constituted authorities of any State or territory from giving or securing to all persons within such State or Territory the equal protection of the laws.

As Respondents' brief demonstrates, Operation Rescue is certainly the first sort of conspiracy. There can be no doubt that Operation Rescue and its local affiliates also constitute the second sort of conspiracy prohibited by § 1985(3). A central purpose of Operation Rescue is to frustrate the legal system of states and municipalities. Operation Rescue counsels disrespect for and disregard of a legal system that permits abortion and related reproductive health services, and that impartially enforces laws prohibiting trespass, disorderly conduct, and harassment, irrespective of the views on abortion of those who violate them.

There is ample evidence of Operation Rescue's position in the record of this case, in the findings of other courts that have entered orders restraining Operation Rescue, and in the pamphlets and publications of Operation Rescue and its founder, Randall Terry. Plaintiffs' Exhibit 11 (R. 472)[2] is an Operation Rescue pamphlet that calls on local authorities to ignore and abrogate federal constitutional rights:

> Our local civil authorities need not bow to [the Supreme Court]. Our local authorities have responsibility for this municipality. . . . In defiance of Supreme Court edicts, our community can refuse to tolerate legalized childslaughter. That is only a starting point.

When local authorities seek to fulfill their responsibilities, however, Operation Rescue advises wilfully violating local laws and flouting court edicts, because "[a]t the crux of Operation Rescue's philosophy is the belief that participants 'must break man's law to obey god's law.' " Note, Judicial Ineffectiveness: The Inability to Curtail Unlawful Right to Life Protest Activity, 35 N.Y.L.S. L. Rev. 447, 449 (1990) ["Judicial Ineffectiveness"]. Operation Rescue compounds this instruction to break the law with exhortations to disregard the lawful orders of courts, as well:

> The pro-aborts are completely misusing the civil justice system . . . . Judges need to know they should not capitulate. They also need to know very clearly that we will not be intimidated. . . . If a judge bows to the pressure of pro-abortion forces, he must know [that] . . . . [t]hese cases will take up precious time on an already overcrowded docket . . . . He will look foolish to the public for issuing an order because rescuers won't obey.

R. Terry, letter in Operation Rescue pamphlet, part of the record in *New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y.),

[2] Citations to the Record are to the Appendix filed with the U.S. Court of Appeals for the Fourth Circuit.

aff'd 886 F. 2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), quoted in Note, Judicial Ineffectiveness, at 450 n. 55.

There have been numerous findings of contempt against Operation Rescue participants for intentionally flouting court orders. *See, e.g., New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Roe v. Operation Rescue*, 919 F.2d 857 (3rd Cir. 1990); *NOW v. Operation Rescue*, 747 F. Supp. 760 (D.D.C. 1990) (contempt opinion at 1990 U.S. Dist. LEXIS 9017, No. 89-2968-LFO) (D.D.C. Jul. 30, 1990)).

A. *Providing A Remedy Against Private Conspiracies Intended to Hinder State Authorities from Securing Equal Protection Is One of The Essential Functions of § 1985(3)*

The legislative history of § 1985(3) demonstrates that the intent to reach just this sort of conspiracy — that is, a conspiracy that has the "purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws" — is one of the central aims of the statute. *Cf. Great American Fed. S & L. Ass'n v. Novotny*, 442 U.S. 366, 384 n. 5 (1979) (Stevens, J., concurring) (the quoted language from the statute "sheds important light on the meaning of the entire section.")

A particular motivation for section 2 of the Ku Klux Klan Act, from which § 1985(3) is derived, was the congressional desire to remedy lawless acts of intimidation that threatened the ability of the states to secure equal applications of their laws and of federal rights. *See* Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L. Rev. 402, 405 (1979). Section 2 of the original Act specifically enumerated conspiracies "to hinder the course of justice in state or territorial courts, or to injure any person for enforcing the equal protection of the laws." 17 Stat. 14, § 2 (1871).

As the Act evolved into the language now found in § 1985(3), the legislative concern with interferences with state law

enforcement remained. Congressman (later President) Garfield, in what has been called "[t]he most significant speech of the debate," R. Harris, The Quest for Equality 47 (1960), explained that the bill was a natural extension of the fundamental equal protection guarantee of the Fourteenth Amendment:

> [T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the [bill] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection. . . .

Cong. Globe, 42d Cong., 1st Sess. at app. 153 (1871).

Congressman Burchard, in summarizing the import of the amended bill, explained that conspiracies within the ambit of the section included "those designed to prevent the equal and impartial administration of justice. . . . The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection." *Id.*, app. at 315.

Congressman Poland of Vermont agreed:

> If a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing State authorities from carrying out their constitutional provision, then I do claim that we have the right to make such interference an offense against the United States.

Id., app. at 514.

Conspiracies that fall within the "prevent and hinder" clause of § 1985(3) also, by definition, implicate the state sufficiently to satisfy the requirement, emanating from the Fourteenth

Amendment, that there must be some "state involvement" in the deprivation of equal rights. *See Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971); *Great American Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366, 384-85 (Stevens, J., concurring). The state itself does not have to intend to deprive rights, or to concur with or support the private conspiracy. *See People, By Abrams v. II Cornwell Co.*, 695 F.2d 34, 41-43 (2d Cir. 1982), *modified on other grounds*, 718 F.2d 22 (1983). Indeed, as here, the states can actively endeavor to prevent the private conspiracy from working its harm. State involvement comes from private conspirators' prevention and hindrance of state authorities in enforcing and administering the laws. Nor is it necessary that the conspiracy be successful in preventing the state from using its laws to punish the conspirators.[3] *See also U.S. v. Price*, 383 U.S. 787 (1966).

Operation Rescue literature advises adherents that they can accomplish the aim of frustrating justice by turning out in masses at the blockades.

> The larger the group doing the rescue mission, the lighter the sentence. You should check how overloaded your city's jail and court systems are. In many, many cities, the courts and jails are too overloaded to deal with rescue missions.

R. Terry, To Rescue the Children 49 (1986). *See also*, Note, Judicial Ineffectiveness. Another Operation Rescue pamphlet, part of the Record below, which formed a basis for the district court's finding that Operation Rescue intentionally hindered state court authorities, announces:

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[3] It is irrelevant to the applicability of § 1985(3) that participants in Operation Rescue have in fact been convicted under local criminal provisions. *See* Brief Amicus Curiae in Support of Petitioners by Concerned Women of America. The hindrance of state authorities in this case comes primarily from the fact that Operation Rescue has shut down health care facilities and has rendered local law enforcement powerless to prevent the closure and has engaged in tactics to ensure that many blockade participants will never be arrested. The fact that some blockade participants have been arrested and convicted does not eliminate the hindrance of the state's ability to secure equal protection of the laws guaranteeing access to health care.

> 1000 or 1500 peacefully praying around an abortion mill will be *very difficult* to arrest! In many cases like this in other movements, the officials did not arrest people because of the sheer numbers involved.

R. 484 (emphasis in original). The demonstration that occurred in Falls Church Virginia on October 29, 1988 (during a national day of "rescue" activity) is evidence of this philosophy in execution:

> Typical of most "rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours.

726 F. Supp. 1483, 1489, n.4.

Operation Rescue "[p]articipants are instructed to delay each step of the arrest process to the best of their abilities." Note, Judicial Ineffectiveness, at 451. One of the ways this is accomplished is by "other protestors replac[ing] those taken away by simply rolling in and laying in the vacant spaces. The purpose of this is to prolong the demonstration for as long as possible." *Id.* at 451. *See also Cousins v. Terry*, 721 F. Supp. 426, 431 (N.D.N.Y. 1989) ("All the outside entranceways to [the health care clinic] were blocked by rotating groups of approximately 200 sit-in demonstrators. There were over 40 arrests.")

Another tactic intended to frustrate arrest involves demonstrators' lying down in front of police cars to prevent police from exiting the scene to take those arrested for booking. *Pro-Choice Network of Western New York v. Project Rescue*, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990). An additional method employed by Operation Rescue and local affiliates is for those arrested to refuse to give their real names, so that they must be held at least overnight before they can be processed by the system. *See, e.g.*, Gannett Westchester Newspapers, Feb. 25, 1991, p. A8; Buffalo News, October 29, 1989, p. B1; Rochester Democrat & Chronicle, Sept. 25, 1988, p. 1A; Note, Judicial Ineffectiveness.

The refusal of Operation Rescue and its local affiliates to notify authorities in advance of the location of a blockade, or to obtain necessary permits, where required, also deliberately hinders the ability of police to secure the equal protection of the laws. When protestors reach the site and block the entrance before the police can be notified and respond, the duration of blockades and thus the period during which women are denied health care is prolonged and could be life threatening.* As the district court below observed, "[l]imited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a clinic for some time." 726 F. Supp. at 1489 n.4. *See also New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989) (Operation Rescue held in contempt for failure to notify New York City police of date and location of blockade; failure prevented police from keeping clinic open and caused the city to incur substantial overtime costs); Note, Judicial Ineffectiveness, at 450-51.

Even when the authorities receive advance notice, however, the conspirators explore other tactics to frustrate the ability of the police to secure equal protection of the laws. As Police Lieutenant Gregory King of Falls Church, Virginia testified in the district court below,

> [In December 1985] we knew that our clinic was going to be hit and we were able to plan and we were there long before it got started. But [the clinic] still went down, yes.

R. 214.

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* While clinics are permitted to sue under § 1985(3), individual women seeking reproductive health care are often in no position to sue for the protections of local and state laws. Seeking reproductive health care, including abortion services, is an intensely private matter. Yet, Operation Rescue preys on fears of disclosure and uses the private nature of the matter to harass and intimidate women from exercising their rights. *See, e.g., Northeast Women's Center, Inc. v. McMonigle*, 868 F.2d 1342, 1346 (3rd Cir. 1989); *Chico Women's Health Center v. Scully*, 256 Cal. Rptr. 194 (Cal. App. 1989); *Pro-Choice Network of Western New York v. Project Rescue*, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990).

Despite the best efforts of state and local authorities, the massive nature of the blockades, coupled with the failure to alert the police, severely hampers the ability of the states to stop the conspiracy and thereby secure the equal protection of the laws for women seeking to exercise protected rights to reproductive health care. Here, the district court found that these tactics rendered the police "unable to prevent the closing of the clinic for more than six hours." 726 F. Supp. at 1489, n.4. As the Falls Church police lieutenant explained, the small department was overwhelmed, and even the combined efforts of the local police, the County sheriff, and the Virginia State Police were unavailing in opening the clinic. R. 213-214. So also, in the proceedings below, Captain Downs from the Forestville, Maryland, police department testified, "we're outnumbered. There's nothing we can do." R. 273. "I cannot pull all the resources from the county. . . . There's no help. We have 80 men, and I've already pulled the resources from the county and state police. And we're doing all we can do." R. 276. Similar helplessness on the part of police to keep clinics open was described in *New York State NOW* v. *Terry*, 704 F. Supp 1247 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied* 110 S. Ct. 2206 (1990); and *Cousins* v. *Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989).

When Congress enacted § 1985(3), it evinced its intent to afford a federal remedy to address the hindrances that conspiracies such as Operation Rescue pose to state authorities, particularly when the aim of these conspiracies is to force legal change by tactics of intimidation and coercion, rather than through orderly deliberation and democratic processes. *See* Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L Rev. 402, 405, 408-11. As the bill's sponsor, Congressman Shellabarger, remarked, "these barbed conspirators have the political aim . . . to trample into dust these newly acquired political rights of the freedman and the constitutions and laws which confer them." Cong. Globe, 42d Cong., 1st Sess. 517 (1871).

The concerns of legislators in 1871 are no less relevant to the Operation Rescue conspiracy. The expressed intent of the

Operation Rescue conspiracy is to coerce states into overturning reproductive health laws through a campaign of harassment and lawlessness. Operation Rescue hopes that besieging the communities in which those services are provided will force legislatures to decide that the cost of allowing the provision of certain health care services in a state is too high.

Operation Rescue literature is quite explicit about this aim. Randall Terry, the founder and leader of Operation Rescue, offers the following theory of how to accomplish legislative change: "legislative change (for good or evil) follows in the wake of street level activism and general unrest." R. Terry, To Rescue the Children 56. "If a wave of large rescue missions sweeps the country, politicians will see that we mean business, and the wheels will be set in motion to reverse" abortion laws. *Id.*, at 57.

Operation Rescue's philosophy of disruption endangers the principles of the rule of law upon which our nation and states are founded, and which § 1985(3) was designed to secure against the actions of private conspirators who, dissatisfied and impatient with the results of the democratic process, determine to take the law into their own hands. As this Court admonished in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967):

> No man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

388 U.S. at 320-21.

In contrast to those who through protest and assembly sought four decades ago to secure rights of citizenship, members of

Operation Rescue suffer no impediment to their access to the ballot or other discrimination. Nevertheless, they seek to subvert orderly political change through tactics which pose a grave hindrance to state authorities obligated to enforce the law even when controversial. When the states' ability to guarantee equal protection of law for all citizens is threatened, § 1985(3) must be available to secure the enjoyment of self-governance and the democratic process.

B. *The "Prevent and Hinder" Clause of § 1985(3) Applies to a State's Ability to Secure the Equal Protection of State and Federal Rights*

Both the legislative history of § 1985(3) and prior pronouncements of this Court confirm that conspiracies to "prevent and hinder" state authorities are actionable when the states are frustrated from securing to citizens the equal protection not only of federal rights, but also of state-law-based rights. The difficulties states encountered in prosecuting the Klan for its violations of state laws was one of the concerns behind the "prevent and hinder" clause in the statute. *See* Gormley, Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3), 64 Tex. L. Rev. 527, 566-71 (1985)("The very fear prompting the passage of section 1985(3) was that certain private individuals were effectively denying Negroes the equal application of the laws in state courts, despite evenly drawn laws." *Id.*, at 571). A private conspiracy motivated by animus against the constitutional rights of a class of persons may operate at two levels. First, in pursuit of the goal to effect deprivations of constitutional rights, the conspirators may engage in acts which violate state and local laws; then, to further the deprivation, the conspiracy may act to hinder the ability of state and local authorities to secure the protections of the state laws to the despised class. Section 1985(3) is applicable to both situations.

Representative Lowe explained at length how the latter situation could constitute a conspiracy by private actors, without direct state action, to deprive persons of the equal protection of the laws, and why, despite the absence of direct state action, a federal law could reach such a conspiracy:

> I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill are not done in pursuance of any law or act of the States, that there is no State authority or laws impeding the citizens in the enjoyment of their rights, the section quoted does not apply. It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect. . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a State? If a State has no law upon its statute-book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the Constitution to the citizen?
>
> The argument leads to the deduction that while the first section of the amendment [now 42 U.S.C. § 1983] prohibits all deprivation of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. All you have to do, therefore, under this view, to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute-book, but quietly permit rapine and violence to take their way, without the hinderance [sic] of local authorities. Such a position, Mr. Speaker, defeats itself by its own absurdities. The rights and privileges of citizens are not only not to be denied by a State, but they are not to be deprived of them.

Cong. Globe, 42d Cong., 1st Sess., at 375. In the Senate, Senator Freylinghuysen underscored the same point:

> It is a poor comfort to a community that has been outraged by atrocities, for the officials to tell them,

> "we have excellent laws on our statute books." It is the citizen's right to have laws for his protection, to have them executed, and it is the constitutional right and duty of the General Government to see to it that the fundamental rights of citizens of the United States are protected.

Id., at 501.

As a commentator who closely studied the legislative history on the source of the rights equally secured to citizens by § 1985(3) concluded:

> It is worth pointing out that section 1985(3) – unlike section 1983 – does not require the deprivation of some constitutional or federally protected right. It speaks only of the deprivation of the equal protection of the laws. Thus, the rights at stake in section 1985(3) cases need not be the more familiar first or fourteenth amendment guarantees, or any other right found in the United States Constitution. Instead, the rights at stake will normally be the equal protection of *state* laws – trespass laws, contract laws, property laws, and tort laws. These sorts of rights have a life all their own, with or without state action.

Gormley, Private Conspiracies and the Constitution, 64 Tex. L. Rev. at 571.

Decisions of this Court support that conclusion. In *United States v. Harris*, 106 U.S. 629 (1882), the Court found that an indictment that alleged a conspiracy to "prevent and hinder the constituted authorities of the State of Tennessee" from securing the "equal protection of the laws of Tennessee" stated a claim under the "hindering" clause of the criminal analogue of § 1985(3). The case involved a conspiracy by private defendants to break into a county jail and attack prisoners awaiting trial, in violation of state law. In *Briscoe v. LaHue*, 460 U.S. 325, 337-38 (1983), the Court also indicated that a conspiracy to prevent state authorities from securing equal protection of *state* laws

was one of the specific designs of § 1985(3). And, in *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971), the Court found that a complaint alleging that the purpose of the conspiracy was to prevent African-Americans from enjoying equal rights under the laws of the United States *and* the State of Mississippi stated a cause of action under § 1985(3).

No matter what the constitutional status of the right to determine whether to obtain an abortion, and regardless of whether Operation Rescue interferes with the right to interstate travel, the conspiracy involved in this case violates § 1985(3). At the heart of Operation Rescue's purpose and method is obstruction and hindrance of prompt, effective, and equal enforcement of state law. Through a panoply of tactics which overwhelm the police, shut down health care clinics, hinder police efforts to reopen them, and delay arrest or arraignment, Operation Rescue hinders state authorities from securing to citizens the equal protection of state laws prohibiting trespass, harassment, nuisance, and interference with contractual relationships. Operation Rescue also hinders state authorities from securing to citizens the equal protection of state public accommodation laws which guarantee equal access to health care. And, Operation Rescue hinders state authorities from offering to women the equal protection of state laws authorizing the availability of abortion services.[5]

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[5] Many states may continue to authorize abortion services even if *Roe v. Wade*, 410 U.S.113 (1973) were to be overruled. New York State, for example, legalized abortion services in 1970, three years before the Court found that the right to choose whether to have an abortion was a constitutionally protected right. Given the petitioners' aims, it is highly likely that they would continue to disrupt health care facilities offering abortion services in states where such services are authorized, no matter what the constitutional status of the abortion right. Thus, the conspiracy would continue to violate § 1985(3).

II. IT IS NECESSARY TO APPLY FEDERAL CIVIL RIGHTS LAW BECAUSE BOTH THE FEDERAL RIGHTS UNDER ATTACK IN THIS CASE AND THE OPERATION RESCUE CONSPIRACY TRANSCEND THE LIMITS AND AUTHORITY OF ANY ONE STATE

While it severely frustrates state-law-based rights, the Operation Rescue conspiracy fundamentally seeks to eviscerate women's federal constitutional rights: their right as citizens of the United States to travel interstate to obtain health care, *Doe v. Bolton*, 410 U.S. 178 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); their right to determine whether to obtain an abortion, *Roe v. Wade*, 410 U.S. 113 (1973); and their Fourteenth Amendment right to the equal protection of both state and federal laws.

Moreover, the burdens and obstructions posed by Operation Rescue to women and to the targeted states are national in scope. Operation Rescue and its affiliates operate throughout the nation, wherever there are providers of abortion and related reproductive health services.[6] While the states have a strong interest in protecting federal constitutional rights, the obligation

[6] The geographical range of the numerous cases brought against Operation Rescue and local affiliates illustrates its high and sustained level of nationwide activity. *See, e.g., New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y.), *aff'd* 886 F.2d 1339 (2d Cir. 1989), *cert. denied* 110 S. Ct. 2206 (1990); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *Pro-Choice Network of Western New York v. Project Rescue and Operation Rescue*, Civ. 90-1004A (W.D.N.Y. Sept. 27, 1990); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), *vacated* 915 F.2d 92 (2d Cir. 1990); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd* 919 F.2d 857 (3rd Cir. 1990); *NOW v. Operation Rescue*, 747 F. Supp. 760 (D.D.C. 1990); *NOW v. Operation Rescue*, No. N-89-3098 (D. Md. Nov. 9, 1989); *Aradia Women's Health Center v. Operation Rescue*, No. 88-1539R (W.D. Wash. Jul. 7, 1989); *Portland Feminist Women's Health Center v. Advocates for Life and Operation Rescue*, 712 F. Supp. 165 (D. Or. 1988); *Southwestern Medical Clinics of Nevada v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal docketed*, No. 90-5519 (9th Cir. 1990).

does not and should not fall solely on states. No state, or group of states, is equipped alone to deal with and redress the deprivations of federal rights caused by the nationwide activity of Operation Rescue.

Through the application of § 1985(3), one of the most significant and serious effects of Operation Rescue – the interference with federal constitutional rights – can be redressed.[7] In recognition of this principle, the National Association of Attorneys General resolved, at its March, 1985 meeting in Washington, D.C., that:

> Whereas, there has been an increase across the country in the number and seriousness of attacks on facilities that provide abortions; and Whereas, there has been illegal harassment and intimidation of the people who work in or visit abortion clinics; and Whereas, these unlawful activities threaten the public safety and interfere with the exercise of constitutional rights; Now Therefore, Be It Resolved, that the National Association of Attorneys General condemns the threats and acts of violence and intimidation against abortion clinics, and calls for a swift and forceful response by all levels of law enforcement; . . . and the Department of Justice [is requested] to investigate and prosecute these activities. . . .

Oversight Hearings on Abortion Clinic Violence, Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, House of Representatives, 99th Cong., 1st & 2nd Sess. at 130 (1985). Just as the National Association of Attorneys General recognized the need for federal criminal remedies under 18

[7] While some states, such as Massachusetts, have laws authorizing the Attorney General or private injured parties to bring civil actions to redress deprivations of state and federal rights, *see* Mass. Gen. L. ch.12, §§ 11 h, i, j (1988), such provisions do not obviate the need for federal law remedies, as well. The state courts should not be the sole place to which persons deprived of their federal constitutional rights can turn for relief. Indeed, such a result would be directly contrary to the intent of the Congress that enacted § 1985(3).

U.S.C. § 241, the criminal analogue to § 1985(3), it is imperative to preserve citizens' access to federal civil remedies that address the threats of this national conspiracy.

The experience of state and local authorities demonstrates that criminal prosecution and punishment under local laws are insufficient to deter repeated blockades and harassment. Operation Rescue participants are not deterred by jail or similar criminal sanctions because they believe the imposition of sanctions renders them "martyrs", and thus more effective proselytizers, for their cause. Many members have been arrested and sentenced multiple times because of repeated offenses at health care facilities all around the country. Thus, the best efforts of one locality may simply drive the conspirators to the clinic in the next town or the next state, while the deprivations of constitutional rights continue.

Finally, the federal remedy of § 1985(3) must be applied because the federal rights involved, particularly the right of every citizen to travel interstate, are larger than the concerns of any particular state. At the same time, certain states are disproportionately affected by the combination of the need of women to travel interstate to obtain abortion services and the disruptive and dangerous activities of Operation Rescue. The right to interstate travel, which can only be secured by the application of § 1985(3), is especially crucial in the context of abortion and reproductive health care services. Some states at present have within their borders very few providers of abortion services. For example, in 1988, the States of Arkansas, Delaware, Idaho, Kentucky, Mississippi, Nebraska, North Dakota, Rhode Island, South Dakota, Utah, West Virginia, and Wyoming had fewer than ten, and in some instances one or no providers of abortion services within the state. See NARAL Foundation, A State-By-State Review of Abortion Rights 186 (1991) (source of data: Alan Guttmacher Institute). Other states have a larger number. The States of Georgia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington have over fifty providers of abortion services, while the States of California, Florida, and

New York contain over 100 providers of this type of health care. *Id.* Obviously, certain states bear the brunt of Operation Rescue activities and of the attendant burdens.

Given the geographic maldistribution of this type of health care service, the residents of some states are practically unable to obtain needed, and perhaps urgent, health care unless they can engage in unimpeded interstate travel. Citizens of states with a dearth of abortion services have an interest in obtaining reproductive health care elsewhere, without interference and delay. And states which attract significant numbers of women patients from out of state have an equally strong interest in maintaining unimpeded access to their health care facilities for residents and nonresidents alike.

For these reasons, it is in the interest of the states that have borne the greatest brunt of Operation Rescue to ensure that the federal civil rights laws are fully available to the victims of Operation Rescue. Citizens' invocation of § 1985(3) in this situation must be available to protect the right to travel interstate to obtain health care. Such suits will supplement, and thereby preserve, the resources of those states that have been disproportionately disrupted by Operation Rescue either because of their geographical location close to other states with fewer providers, or precisely because of their sovereign legislative judgments regarding abortion regulation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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